

E-FILED on 11/05/08

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

STEVE TRACHSEL et al.,

Plaintiffs,

v.

RONALD BUCHHOLZ et al.,

Defendants.

No. C-08-02248 RMW

ORDER GRANTING APPLICATION FOR
ORDER COMPELLING COMPLIANCE
WITH AUGUST 8, 2008 ORDER

Plaintiffs apply for an order compelling defendants to comply with this court's August 8, 2008 order regarding depositions. For the reasons stated below, the court grants the motion.

I. BACKGROUND

This suit arises out of an allegedly fraudulent real estate investment scheme involving the purchase, renovation, and resale of a high-rise condominium property. Plaintiffs have applied for a right to attach order and for an order for issuance of a writ of attachment. At a hearing on August 8, 2008 on that motion, the parties stipulated to participate in limited discovery. Each side agreed to conduct three depositions limited to (1) whether the securities are exempt under Corp. Code § 251012 (f) and/or are subject to rescission; and (2) the issues set forth in plaintiffs' motion to conduct early discovery.

After initial notices and scheduling discussions, plaintiffs noticed the depositions of Ronald Bucholz ("Bucholz") and Charice Fischer ("Fischer") for October 7 and October 2, 2008, respectively. On September 30, 2008, defendants' counsel Andrew August sent an email to all counsel stating that all depositions were temporarily off calendar, because plaintiffs counsel, Jesshill Love, had refused to produce plaintiffs' financial documents in connection with their depositions. The depositions have not taken place, and plaintiffs move to compel the depositions of Bucholz and Fischer.

II. ANALYSIS

The Federal Rules of Civil Procedure permit no discovery "from any source before the parties have conferred as required by Rule 26(f)" except when authorized by the rules, a stipulation, or a court order. Fed. R. Civ. Pro. Rule 26(d)(1). The parties August 8, 2008 stipulation, read into the record during a hearing, states:

The parties stipulate to conduct three depositions per side within the next sixty days limited to, one, whether the securities are exempt under Corp. Code Section 25102(f) and/or are subject to rescission; and, two, the issues set forth in Plaintiffs' motion to conduct early discovery.

Plaintiffs shall take the depositions of Ronald Bucholz, . . . Charice Fischer, also a named Defendant, and Valerie Bunnell. . . . Defendants shall take the depositions of Plaintiff Tom Cirrito, Plaintiff Michael Cirrito, and Plaintiff Steve Trachsel. Plaintiffs shall produce the Cirrito Defendants in California. The depositions shall be taken without prejudice to the parties' rights to conduct formally noticed depositions of deponents pursuant to FRCP at a later date.

The parties shall submit supplemental briefings inclusive of motion opposition and reply at the conclusion of the 60-day period pursuant to a briefing schedule to be determined by the Court.

Response to Pls.' Reply in Support of Ex Parte Application Ex. D, 21-22. The stipulation allows both parties to conduct the stated depositions. Relying on the stipulation, plaintiff moves to compel. Defendant responds that plaintiffs' counsel has failed to produce financial documents in connection with defendants deposition of Tom Cirrito, Michael Cirrito, and Steve Trachsel. Because of this refusal, defendants' counsel argues, the motion to compel should be denied.

The court finds, first, that the stipulation unambiguously permits the requested depositions. The parties' instant dispute concerns only whether it allows accompanying documentary discovery. For the depositions of Bucholz and Fischer, for whom no documentary discovery is requested, this

dispute is not relevant. Plaintiffs' purportedly obstructionist refusal to produce financial records does not effect the propriety of deposing defendants, which is explicitly permitted in the August 8, 2008 stipulation. The motion to compel is therefore granted.


Defendants' opposition focuses on plaintiffs refusal to provide financial documents in connection with their deposition. As stated above, the instant dispute takes place against the background of Rule 26(d)(1)'s bar on pre-26(f)-conference discovery. The parties agree that the stipulation includes no explicit permission to discover documents. Defendants argue that the court's discussion, and plaintiff's counsel's comments, "reflect an unstated understanding that documents are needed to address the issues before the Court on the Writ Application."

The court cannot find any such understanding in the transcript or stipulation. The issue on which defendants seek discovery, whether plaintiffs are accredited investors, appears preliminarily ascertainable with questions alone. *See* Pls.' Ex Parte Application For Order Compelling Compliance With 8/8/08 Order 5. At the very least, defendants do not justify their request for "[all] of the financial information about the Cirritos. All investment portfolios, real estate holdings, tax returns, etc." Decl. Of Andrew August in Opp. To Pls.' Ex Part Application, Ex. C, 40. The court therefore finds that the stipulation allows only depositions, and that the documentary discovery defendants request is foreclosed at this time.

III. ORDER

Plaintiffs motion to compel compliance with the August 8, 2008 order is granted.

DATED: 11/05/08


RONALD M. WHYTE
United States District Judge

1 Notice of this document has been electronically sent to:

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11 Counsel are responsible for distributing copies of this document to co-counsel that have not
12 registered for e-filing under the court's CM/ECF program.

13 **Dated:** 11/05/08

JAS
Chambers of Judge Whyte